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In The

Supreme Court of the United States

WILLIAM OVERTON, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments.

2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.

3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

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STATEMENT OF THE CASE

This case is about the rights of prisoners and their family members to communicate and associate with each other by having non-contact visits while one member of the family is incarcerated. It is also about a state prison administrator implementing a permanent ban on all visits between prisoners and prisoners' family members and friends as a punishment for two substance abuse misconducts.

The rules at issue came about after Petitioners imposed stricter limits on the number of visits allowed each prisoner per month and the number of visitors allowed per visit. They also limited to ten, the number of non-immediate family members allowed on each prisoner's pre-approved visitor list. JA 111-25. Respondents did not challenge these time, place and manner rules.

Four months later, Petitioners issued a new series of visiting restrictions, four of which severely impacted visits between particular family members. One prohibited all children under age eighteen from visiting incarcerated family members unless they were the child, step-child or grandchild of the prisoner, thus eliminating all visits between prisoners and their minor brothers, sisters, nieces and nephews. A second rule prohibited a prisoner's own biological child from visiting if the prisoner had voluntarily terminated parental rights to promote the child's best interest, *e.g.*, to permit adoption by another family member. Under a third rule, a prisoner's minor children could only visit if brought by an immediate family member or a full legal guardian. This prevented visits by children when the only responsible adults available to accompany the child were aunts, uncles, or the parent of the child (if no longer the spouse of the incarcerated parent), close family

friends, and even social workers. A fourth rule barred extended family members who were former prisoners from visiting, regardless of how long they had been law-abiding members of the community.

The final rule challenged by Respondents provided for a permanent prohibition of all visits, except those from attorneys or clergy, to any prisoner found guilty of two misconducts involving substance abuse. Such misconducts include possession of prison made alcohol, failing or being unable to complete a urine test, and being in possession of prescription medications contrary to institutional rules, as well as illegal drug use and possession.[1] While Petitioners attempt to soften the effect of the rule by characterizing it as a minimum two-year restriction on visits, the rule explicitly provides for a permanent restriction on all visitation and contains no restoration criteria. Petitioners' Application at 177a. Ostensibly, the rule required the director's approval of each permanent ban. However, in practice they were intended to be automatic. 6th Cir. Jt. App. at 4155-58. As of May 2000, over eleven hundred prisoners were on a permanent visitation ban as a result of the 1995 policy. JA 423a.

The district court first addressed the restrictions on minors and former prisoners when it denied a request for a preliminary injunction by Respondents, a class of prisoners and their family members affected by the rules, and dismissed Respondents' complaint, ruling that a deprivation of contact visits failed to state a claim. The district

[1] A separate rule that allows the permanent restriction of visits for smuggling or other misconduct related to a visit was not challenged by Respondents and remains in effect.

court did not address the challenge to the permanent ban on all visitation, ruling it not ripe for adjudication. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995).

Prison officials had represented to the trial court and on appeal that the rules on minors and former prisoners would result only in loss of contact visits for these categories of visitors. Therefore, on appeal, the circuit court upheld the restrictions on contact visits as reasonably related to security concerns. *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). The circuit court also did not address the challenge to the permanent ban. When apprised that, contrary to prison officials' initial representation, the Plaintiff class was deprived of both contact and non-contact visits, the circuit court issued a Supplemental Opinion to clarify that its analysis and ruling applied only to the restrictions on contact visits. *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998), *cert. denied*, 524 U.S. 953 (1998).[2]

The case was reinstated to address the permanent visitation ban for substance abuse misconducts and the ban on non-contact visits by minor family members and former prisoners. At a two-week trial, Respondents presented a wide variety of witnesses, including a MDOC

[2] Petitioners' statement of the case relies almost entirely on language gleaned from the 1997 circuit court opinion affirming their Motion to Dismiss. This ruling was made prior to any discovery occurring and without benefit of a factual record. The trial on the merits produced detailed factual findings, which Petitioners did not challenge on appeal. Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses").

deputy director and the former administrator of the MDOC Office of Policy and Hearings, called as adverse witnesses. Both testified at length about the purpose of the rules, their procedural history, and how they were applied. From this testimony, it was apparent that the impact of the restrictions on minor sibling nieces and nephews had not been considered and the specific goals of those restrictions were unclear. Both witnesses explained that the permanent visiting restriction for two substance abuse misconducts was adopted by the former director as part of his "zero tolerance" approach to substance abuse, despite protests from the public, some of the wardens and his own staff, and the lack of a particularly significant drug problem in Michigan's prisons.

The warden of one of the women's prisons was also called by Respondents as an adverse witness. She testified about the impact of the rules on women prisoners and their children in particular. Respondents also presented several expert witnesses who criticized the rules. A psychologist and former MDOC warden, testified about the importance of visits for prison management and prisoner rehabilitation. A psychiatrist with extensive background in correctional issues testified at length about the special vulnerabilities of the prisoner population, the importance of visits to the mental health, stability, and rehabilitation of prisoners, and the damage done to prisoners, their children, and familial relationships by Petitioners' restrictions on visits.

Prisoners, former prisoners and family members testified to the impact of being forbidden to see family members and loved ones, even on a non-contact basis. The district court reviewed the testimony presented by both

parties in detail in its opinion finding multiple constitutional violations. Applying the standards in *Turner v. Safley*, 482 U.S. 78 (1987), the district court concluded that, "Even under the most deferential review, these restrictions are not reasonably related to legitimate penological interests." *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 858 (E.D. Mich. 2001).

A unanimous panel affirmed the district court's findings of fact and conclusions of law. *Bazzetta v. McGinnis,* 286 F.3d 311 (6th Cir. 2002). In affirming, the Sixth Circuit Court of Appeals applied *Turner,* and found that the prohibition on visits by minor relatives was an exaggerated response to security and visiting space considerations, that it was not reasonably related to any legitimate penological goals, and that alternative methods of maintaining family relationships were inadequate. The circuit court made similar findings regarding the other restrictions on categories of visitors. *Id.*

The circuit court struck down the permanent ban on visits to prisoners with two substance abuse misconducts, on three independent constitutional grounds: 1) it found that the rule violated Respondents' First and Fourteenth Amendment rights as the "ban does not meet even the forgiving *Turner* standard"; 2) it characterized the ban as "an extremely harsh measure" that "far exceeds punishments meted out by any other state prison system for comparable violations" in ruling that the ban violated the Eighth Amendment; and 3) it found that "[T]he department has imposed visitation bans capriciously and according to no reviewable standards" thereby causing a due process violation. *Id.* The circuit court then concluded:

> Under our constitution, even those lawfully imprisoned for serious crimes retain some basic

> constitutional rights. Instead of crafting policies that would legitimately meet the very real need to maintain order in prisons, the department has implemented a series of haphazard policies that violated these rights and did real harm to inmates in its care. It then defended these policies not with reasoned arguments, but with misdirection and demands that federal courts blindly defer to corrections officials.

Id. at 323.

Petitioners' request to stay the mandate pending filing a petition for writ of certiorari to this Court was denied and Petitioners' application to this Court for a recall of the mandate was denied on May 16, 2002. Thereafter the district court entered an Order of Compliance enforcing its judgment and requiring Petitioners to begin approving non-contact visitation for previously prohibited categories of visitors. Petitioners were also required to lift permanent visiting bans imposed for substance abuse. Petitioners' Application at 1a-4a. Visits have been occurring since May 16, 2002.

SUMMARY OF ARGUMENT

Prisoners and their prospective visitors have First and Fourteenth Amendment rights to speech, intimate association, and familial relationships that are not inconsistent with incarceration. Visits by family and loved ones have long been recognized as a critical means of implementing those rights and of preserving families, promoting prisoner rehabilitation, and enhancing successful return to the community.

These constitutional rights can only be restricted if the four-factor test of *Turner* is satisfied. After a two-week trial, the district court made extensive findings of fact

necessary for balancing the competing interests of prison administration and prisoners' constitutional rights, which Petitioners have not shown to be clearly erroneous. Based on these findings, the court found that the challenged visiting regulations violate Respondents' First and Fourteenth Amendment rights. The circuit court affirmed all these conclusions.

The exclusion of minor siblings, nieces and nephews and of former prisoners from non-contact visits, and the restrictions placed on visits by prisoners' biological children, bear no reasonable relationship to any valid penological objective. None of the various justifications for the rules – controlling the volume of visitors, protecting children from injury and sexual assault, and preventing smuggling – are actually advanced by barring minor relatives and former prisoners from non-contact visits. The asserted justifications for the restrictions on prisoners' children are also unsupported by the record.

The other challenged regulation permits the permanent elimination of all visits (except by attorneys and clergy) to prisoners who have received two misconducts for substance abuse. The misconducts at issue are not related to visiting or limited to illegal drugs. Far more serious prisoner behavior, such as assault, rioting, and possession of weapons does not result in such visiting restrictions.

The testimony established that this unique and extraordinarily harsh punishment has a devastating effect on prisoners and their families. Because it bars parents, spouses and the prisoner's own children, it has a broad impact on Respondents' rights to intimate association. This punishment has no logical connection to Petitioners' asserted goal of reducing substance abuse, beyond the general assumption that punishment of any kind deters

misconduct. However, punishment of any kind cannot be justified solely on the rationale that prison officials are entitled to impose discipline. When the punishment infringes on constitutional rights, it must pass the reasonable relationship test of *Turner*.

Even if the challenged regulations are found to have adequate connections to valid penological goals, the remaining *Turner* factors weigh in Respondents' favor. Telephone calls and letters are inadequate for maintaining family relationships over long periods of time, especially with young children. Each of the challenged regulations is an exaggerated response to administrative concerns that can be readily addressed by other available means.

The circuit court also correctly found that the total elimination of visits by family members and other loved ones, for a lengthy and indefinite period of time, constitutes cruel and unusual punishment under the Eighth Amendment. The fact that this was punishment, deliberately administered for the purpose of causing gratuitous pain, demonstrates prison administrators' state of mind and satisfies the "subjective component" of the test for Eighth Amendment violations. *Rhodes v. Chapman*, 452 U.S. 337 (1981). The "objective component" of the test is satisfied because maintaining familial relationships is a basic human need, and the permanent elimination of visits for the misconduct evidenced in this record is a "wanton and unnecessary infliction of pain" that is "totally without penological justification." *Id.* at 346.

No other correctional administration has a rule permanently barring all visits with family and loved ones as punishment for this type of misconduct. The facial uniqueness and cruelty of this rule, along with the callous way it was implemented to deprive hundreds of prisoners

and their families of fundamental rights of association render it in violation of the Eighth Amendment proscriptions against cruel and unusual punishment.

I. PRISONERS RETAIN FIRST AND FOURTEENTH AMENDMENT RIGHTS TO ASSOCIATION ENTITLING THEM TO REASONABLE NON-CONTACT VISITATION

The restrictions on visits with minor family members and former prisoners, and the prohibition of all visits as a method of punishing institutional misconduct, infringe on Respondents' First Amendment rights of association and speech and Respondents' fundamental rights to maintain family relationships as guaranteed by the Fourteenth Amendment.

This Court has frequently and consistently recognized the importance of its role in ensuring constitutional protections for family bonds, including the "interest of a parent in the companionship, care, custody, and management of his or her children [which] 'come(s) to this Court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'". *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J. concurring)).

First Amendment rights of association and speech and Fourteenth Amendment rights to establish and maintain family associations are entitled to "a substantial measure of sanctuary from unjustified interference from the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). *See also Roberts v. United States Jaycees*, 468 U.S. 607, 617-18 (1984) (our constitution provides the highest protection for the most intimate relationships); *Santosky v. Kramer*, 455

U.S. 745, 753 (1982) (the state may not interfere with familial relationships absent clear and convincing evidence of parental neglect).

This Court has explicitly recognized the fundamental nature of the rights of familial or intimate association as liberty interests protected by the Fourteenth Amendment. Beginning with its seminal decisions in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce*, 268 U.S. 510, this Court has repeatedly reaffirmed the principle that the Due Process Clause presumptively prohibits the government from interfering with familial relationships. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect"). *See also Troxel v. Granville*, 530 U.S. 57 (2000).

Prisoners retain those constitutional rights that can be exercised compatibly with incarceration. This Court has also consistently affirmed that prisoners and non-prisoners whose constitutional rights are impacted as a collateral consequence of prison rules are protected from state interference in the exercise of those constitutional rights that are not inconsistent with incarceration or with "the legitimate penological objectives of the corrections system." *Turner* at 95 (freedom of personal choice in matters of family life, including the right to marry, is one of the liberties protected by the Due Process Clause retained by prisoners).

This Court has repeatedly affirmed that prisoners do not shed their constitutional rights at the prison door. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("prisoners do not

forfeit all constitutional protections by reason of their conviction and confinement in prison"). The federal, state and private agencies that manage our country's prisons are not exempt from adherence to the constitution in the exercise of their functions. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect the constitutional right").

Among those constitutional rights that have explicitly been recognized as retained by prisoners are the rights guaranteed by the First Amendment. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (prisoners retain various constitutional rights including First Amendment protection); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment"); *Navin v. Iowa*, 843 F. Supp. 500, 502 (N.D. Iowa 1994) (both inmate-parent and child have First Amendment associational/family rights). *See also Lewis v. Casey*, 518 U.S. 343, 393, 403-04 (1996) (Justice Souter concurring and dissenting).

In *Turner*, the Court held that the right to marry is not inconsistent with incarceration because, even taking inherent limitations into account, "[m]any attributes of marriage remain". *Turner* at 95. The same is true of other intimate, familial relationships. Petitioners' argument, that the fact of incarceration has resulted in few family integrity rights left to protect, minimizes the important aspects of family life that clearly remain to those individuals who do not live together and ignores the reality that the vast majority of prisoners will rejoin their families. Incarcerated parents retain legal custody of their children and carry the responsibility of making decisions about

their care and maintenance.[3] All of the needs and desires for companionship, emotional support, trust and commitment that form the core of family bonds, clearly survive incarceration as they survive other forms of enforced separation.[4] Moreover, *Turner* recognized that prison rules that limit visitation constitute a burden on prisoners' fundamental rights, and are subject to judicial scrutiny. *Turner* at 87.[5]

In the context of prison, visitation is the central means by which Respondents' associational rights are

[3] The majority of women prisoners were single custodial parents of minor children when incarcerated and, with sentences averaging four years, will return to the sole parent caretaker role (Mumola, Christopher J., *Incarcerated Parents and Their Children*, Special Report, Bureau of Justice Statistics, 2000 at 6-7). The time during which mothers are incarcerated is filled with exercising choices regarding placement and ensuring the safe care of their children until they return. *Glover v. Johnson*, 850 F. Supp. 592 (E.D. Mich. 1994).

[4] *See*, for example, *Franz v. United States*, 707 F.2d 582, 595, 602 (2nd Cir. 1983) where the court determined the visitation rights of a divorced father whose ex-wife took their child into a government witness protection program. "The constitutional interest in the development of parental and filial bonds from government interference has many avatars. . . . [A]nd, above all, it is manifested in the reciprocal rights of a parent and child to one another's "companionship" which are no less important, and perhaps intensify when there is a disruption in the normal family home".

[5] *See also Laaman v. Helgemoe*, 437 F. Supp. 269, 320 (D.C. N.H. 1977) (unreasonable restrictions on visitation implicates First Amendment rights of prisoner); *Nicholson v. Choctaw County*, 498 F. Supp. 295, 310 (S.D. AL 1980) (pretrial detainees have First Amendment rights to visitation with their children); *Boudin v. Thomas*, 533 F. Supp. 786 (S.D.N.Y. 1982) (refusal to allow an inmate a contact visit with her infant child violated First Amendment where deprivation was exaggerated response to security concerns and infant not able to communicate through visual contact).

preserved. *Thornburgh*, 490 U.S. at 407 ("Access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them . . . "). A prohibition on visits deprives Respondents of physical association – the ability to be together in the same room and have visual communication and companionship – as well as curtailing speech and expressive association. JA 211-16, 224, 232, 240-42. Far from being inconsistent with legitimate penological goals, visitation is a recognized exercise of prisoners' Fourteenth Amendment rights which have long been incorporated into correctional standards and practice.[6]

The recognition of visits as a basic entitlement is longstanding. *In Re Medley*, 134 U.S. 160, 167 (1890) (noting the availibility of family visits for prisoners held in solitary confinement awaiting execution). This Court has upheld prison rules that burden associational and due process rights by relying, in part, on the continued availability of family visits in some form. In *Block v. Rutherford*, 468 U.S. 576, 578 n.1 (1984), the Court upheld a jail's restrictions on contact visits where it permitted

[6] Bureau of Prisons rules require that a prisoner be provided a minimum of four hours visiting time per month. 28 C.F.R. §540.40, §540.43. The American Correctional Association provides that visits may be limited only upon "clear and convincing evidence of a security risk". Standard 4-4498. The American Bar Association Standards for Criminal Justice preclude imposing any loss of visits for disciplinary infractions, Standard 23-6.2-6.4. International standards, conventions and rules require that, "Prisoners shall be allowed to communicate with their family by receiving visits." *See* United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 37; Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 19.

non-contact visits for family and friends for twelve hours each day, ruling that, in those circumstances, there was no absolute constitutional right to contact visits. *See also Pell* at 824 (upholding restrictions on media visits that would not "seal off inmates from personal contact with those outside the prison" where family visits were allowed; assistance was available for inarticulate or non-literate prisoners from "family and friends who visit them"). *Sandin v. Conner*, 515 U.S. 472, 476 n.2, 486 n.7 (1995) (thirty days in administrative segregation was not sufficiently atypical of prison life to give rise to a liberty interest, in part because the prisoner retained many rights of a general population prisoner, including visitation).

This Court also has repeatedly recognized visitation as integral to the penological goal of rehabilitation. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 465 (1989) (Marshall, Brennan, Stevens, JJ., dissenting) ("There is little, if any, disagreement that the opportunity to be visited by friends and relatives is more beneficial to the confined person than any other form of communication"); *Pell* at 825 (noting prison director's recognition that personal visits "aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system"). *See also Bazzetta*, 148 F. Supp. 2d at 818-19, 845 (it is undisputed that visitation between incarcerated persons and their families is critical to the rehabilitation of prisoners and positively influences their reintegration to society).

Petitioners argue broadly that this Court's opinions upholding rules that burdened prisoners' First Amendment rights stand for the proposition that "expressive association" rights do not survive incarceration. In each of the cases relied upon by Petitioners, however, this Court

acknowledged the existence of prisoners' First Amendment rights and scrutinized the reasonableness of the security concerns underlying the prison rule that burdened that right. *Pell* (restriction on face-to-face media interviews with individual prisoners does not impermissibly infringe on prisoners' First Amendment rights of expression or communication in light of security concerns and fact that press may tour prisons and speak to inmates during tour); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 126, 132 (1977) (inhibition on prisoners' First Amendment associational rights resulting from restrictions imposed on prisoners' unions upheld where justified to prevent "disruption to prison order or stability").

The decisions in *Turner* and *O'Lone* applied a four-pronged test to evaluate infringements on the First and Fourteenth Amendment rights of prisoners. Neither these decisions, nor *Thornburgh*, which utilized the *Turner* standard to review restrictions on publications mailed in to a prisoner, nor *Shaw v. Murphy*, 532 U.S. 223 (2001), which reaffirmed that, "*Turner* provides the test for evaluating all prisoners' First Amendment challenges", stand for the proposition urged by Petitioners – that Respondents do not retain First and Fourteenth Amendment associational rights. Rather, these decisions affirm that any restriction that infringes on these rights must be scrutinized to determine whether it is reasonably related to a legitimate penological objection or represents an exaggerated response to those concerns.[7]

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[7] Respondents' reliance on *Olim v. Wakinekona*, 461 U.S. 238 (1983) is also misplaced. This pre-*Turner* decision did not address prison rules restricting family visitation nor evaluate intimate associational rights.

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II. ALL THE CHALLENGED VISITING REGULATIONS INFRINGE RESPONDENTS' FUNDAMENTAL RIGHTS WHILE FAILING THE REASONABLE RELATIONSHIP TEST OF *TURNER V. SAFLEY*

A. The *Turner* Standard

Respondents freely concede that even the fundamental freedom to engage in and maintain family relationships through visitation may be qualified by prison officials' need to maintain security and order within the prison. In this sense, visitation rights can never be "absolute" or "unfettered". *Block v. Rutherford* (no right to contact visits where non-contact visits routinely permitted); *Kentucky v. Thompson* at 460 (prisoners have no right to "unfettered visitation"). *Bazzetta v. McGinnis*, 148 F. Supp. 2d at 847 n.53 ("there is no inherent, absolute constitutional right to contact visits with prisoners").

However, it does not follow that visits may be severely restricted or wholly eliminated absent a valid penological basis for the action. Restrictions on visitation must be evaluated in light of the scope of the limitation and the asserted penological objective.

Olim's refusal to block transfers of prisoners to distant facilities because of an incidental impact on some prospective visitors who lacked the resources to travel does not negate the existence of a right of family association that survives incarceration. *See also Froehlich v. State of Wisconsin Dep't of Corrections*, 196 F.3d 800, 802 (7th Cir. 1999) (transfer of Wisconsin inmate to West Virginia prison did not violate children's due process right to associate with their mother because state regulation did not intentionally sever bond between parent and child, separation was incidental to incarceration).

In *Turner,* the Court sought to develop a standard that balanced "judicial restraint regarding prisoner complaints and the need to protect constitutional rights." Accordingly, *Turner* requires a comprehensive evaluation of four factors: 1) whether there is a valid rational connection between the prison regulation and a legitimate governmental interest; 2) whether there are alternative ways for the prisoner to exercise the implicated constitutional right; 3) what impact accommodation of the constitutional right would have on the prison administration; and 4) whether the regulation is an exaggerated response to prison concerns.

Petitioners assert that the lower courts failed to apply *Turner* properly, by dismissing their evidence as anecdotal and failing "to accord any deference to MDOC authorities." (Petitioners' Brief at 31.) Their assertions are unsupported by the record.[8] Petitioners' assertion that the district court ignored the testimony of MDOC officials is rendered baseless by even a superficial reading of the court's decision that relied heavily on the testimony of all three named Respondents (the former director, a deputy director, and the former administrator of the office of policy and hearings) as well as on that of former and current wardens, and a statement by a regional administrator. The only evidence the court characterized as anecdotal *was* anecdotal and was admitted as such, not simply accepted as representative of a larger problem.[9]

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[8] Petitioners did not appeal any evidentiary rulings of the district court.

[9] Petitioners assert that they bore an unfair burden of proof because the district court criticized their lack of statistical data and

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Petitioners' real complaint is not that the district court ignored their witnesses, but that it did not unquestioningly accept their assertions. Reliance on bare assertions of reasonableness by a regulation's drafter would amount to an abdication of the judicial role. *Cleavinger v. Saxner,* 474 U.S. 193, 207 (1985) (correctional officials may not restrict the scope of prisoners' constitutional rights by "routine and automatic" assertions of "discipline and security"); *Salaam v. Lockhart,* 905 F.2d 1168, 1171 (8th Cir. 1990) ("We would misconstrue [*Thornburgh, O'Lone* and *Turner*] if we deferred not only to the choices between reasonable polices made by prison officials but to their justifications for the policies as well"); *Campbell v. Miller,* 787 F.2d 217, 227 n.17 (7th Cir. 1986) ("[O]ur deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute"). The

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excluded exhibits that did not constitute an adequate sampling of incidents to be representative. Petitioners' counsel represented at trial that there was evidence of children being exposed to sexual activity during non-contact visits. The district court responded by advising counsel that one or two incidents would not be accepted as a representative "sampling", stressed the importance of the issue, and offered Petitioners additional time to produce every document they could. (6th Cir. Jt. App. at 5315-18). Petitioners never proffered a single document or non-hearsay testimony demonstrating a real possibility of a minor child being sexually abused during a non-contact visit.

Petitioners also complain that the district court did not admit policies of other states into evidence when they offered them three months after the proofs had closed and findings of fact had been submitted. During trial, Petitioners introduced into evidence only those state polices that they believed were most like Michigan's in regard to the permanent ban. The district court analyzed each of the proffered policies and found they were not, in fact, similar. *Bazzetta,* 148 F. Supp. 2d at 835. Petitioners never asserted that any state had comparable restrictions on minors and former prisoners.

deference to be afforded Petitioners is an application of a less rigorous standard of review, not an abdication of the fact-finder's duty. *Flagner v. Wilkinson,* 241 F.3d 475, 481 (6th Cir. 2001).

Even with all possible deference given to the expertise of prison officials in the area of prison management, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner* at 89-90; *Flagner,* 241 F.2d at 482 ("While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response").

The type of uncritical deference envisioned by Petitioners has been repeatedly rejected in recognition of the judicial responsibility to enforce the constitution. *Whitney,* 882 F.2d at 1068, 1074 (when applying *Turner,* a court must not mistake deference for blind acceptance of rationales); *Block,* 468 U.S. at 594 (Blackmun, J., concurring) ("careless invocations of 'deference' run the risk of returning us to the passivity of several decades ago" when the courts turned "a judicial blind eye and a 'hands off' approach" to obvious constitutional violations); *Thornburgh,* 490 U.S. at 414 (while the standard of review for prison rules is deferential, it is not a "toothless" review that merely requires the government to articulate some rationale for a rule).

A determination of reasonableness under *Turner* involves analysis of the factual record and measuring the specific challenged rule against the specific interest

asserted to justify infringement of the prisoners' constitutional rights. *O'Lone*, 482 U.S. at 350-52; *Thornburgh*, 490 U.S. at 414-19. *See also Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990) (reasonableness test of *Turner* a mixed question of law and fact).

Petitioners argue broadly that their regulations are related to concerns with institutional security. While security is, conceptually, a legitimate governmental interest, there must be a nexus between that goal and the challenged regulations. Otherwise, any rule could be justified by a bare claim of security. In a broad sense, any restrictions on visits, could enhance security, as anything beyond "a naked man in chains in a bare cell" poses some security concerns. *Valentine v. Englehardt*, 474 F. Supp. 294, 300-01 (D.N.J. 1979).

The restrictions here are not reasonably related to security concerns. The restrictions on minors and former prisoners resulted from a combination of negligence and callousness, not a reasoned attempt to address actual problems. Nor did the decision to impose a permanent ban on visits for two substance abuse misconducts, in a system that already had a low rate of substance abuse, stem from security concerns, except in the broadest sense that disobeying any prison rule could implicate good order of the facility.

The amicus brief filed on behalf of twenty states does not address the restrictions on minors and former prisoners. Neither the state amici nor the United States amicus even suggest that any other jurisdiction has seen the need to adopt such restrictive policies. While some states use visiting restrictions as discipline for substance abuse to some extent, none approach the extraordinary harshness of Michigan's scheme. Indeed, the U.S. Bureau of Prisons

(BOP) explicitly rejects such unwarranted interference in visitation access. "[W]hile not necessarily controlling, the policies followed at other well run institutions would be relevant to determination of the need for a particular type of restriction." *Procunier v. Martinez,* 416 U.S. 396, 414 n.14 (1974). Nor does the record reflect any unusual problems that would make these rules necessary to preserve order in Michigan prisons while they are unnecessary anywhere else. That is why *Turner* must be carefully applied to the evidentiary record. The spartan and conflicting proofs Petitioners presented below should be sufficient to doom these regulations. *Turner* at 97 ("We conclude that on this record, the Missouri regulation, as written, is not reasonably related to these penological interests").

B. Prohibiting Visits by Minor Family Members and Former Prisoners Infringes Fundamental Rights Without Sufficient Penological Justification

Petitioners have, at various times, articulated three penological interests to justify the regulations affecting minor children and former prisoners: 1) preventing the smuggling of drugs, weapons, and other contraband; 2) protecting children from harm; and 3) controlling the volume of visits.[10]

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[10] Although Petitioners attempted to construct a rationale for allowing minor children and grandchildren to visit while excluding minor siblings, nieces and nephews, both the regional director and the drafter of the rules acknowledged that the prohibition against minor siblings resulted not from any security concern peculiar to minor

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While preventing drug smuggling or harm to children during visits are reasonable penological goals, they must bear some relationship to the prohibition against non-contact visits by children now before the Court. They do not. Children cannot smuggle drugs during non-contact visits, which are specifically designed to prevent such activity. *See also Bazzetta,* 148 F. Supp. 2d at 830, nn.14-18, 832 for additional reasons to reject smuggling as a justification. Petitioners' argument that limiting minors and former prisoners to non-contact visitation does not eliminate smuggling that may occur during *contact* visitation, or when visitors throw contraband over a fence, is simply a *non sequitur*. Petitioners' Brief at 28.

Similarly, a child cannot be physically abused in a non-contact setting, where glass separates the prisoner from the visitor. Consequently, there was never an incident of such abuse in Michigan. *Bazzetta*, 148 F. Supp. 2d at 829 (survey of all facilities uncovered no records of any sexual misconduct involving minors that occurred during a non-contact visit since January 1, 1984.)[12]

siblings, but simply from oversight. JA 27a. *See also Bazzetta* at 822-24, 829; Plfs.' Exh. 56.

[12] A 1994 incident involved a child molested in a visiting room who was brought by its mother for a contact visit with an unrelated prisoner. Pets.' Brf. at 4. An internal MDOC investigation concluded that the department's failure to enforce existing rules permitted that incident to occur. 6th Cir. Jt. App. at 63-64. It is stunning that Petitioners even raise this issue, because the child was assaulted only through a combination of MDOC negligence and callousness. This incident is irrelevant to the non-contact visits by prisoners' children, brothers, sisters, nieces and nephews that are at issue here. *Bazzetta*, 148 F. Supp. 2d at 842.

Unable to argue physical harm during non-contact visits, Petitioners focus on the possibility that a minor might view improper activities in the visiting room. Petitioners refer to an isolated incident of a husband, at a maximum security facility, who had exposed himself during a non-contact visit with his wife, while their child was present seated in a stroller. This incident bears little relevance to the restrictions on other minor children. *Bazzetta*, 148 F.Supp.2d at 829. Further, where there was only a single incident of a minor present during sexual conduct among millions of visits, and this single incident occurred after these rules were implemented, protecting minors from this conduct cannot be viewed as the penological purpose for the rule. 6th Cir. Jt. App. 2470. Its connection to any legitimate penological goal is so remote as to be meaningless.[13]

Petitioners reference a warden's supposition that if a non-contact booth is located in a contact visiting room, there is a risk that children seated in the contact visiting area might witness inappropriate activity occurring during a non-contact visit. Petititioners' Brief at nn.7 & 14. That this warden's attempt to describe how this might occur, which depended on the child being perched on the shoulder of a seated adult (6th Cir. Jt. App. 5430-33), verged on the fanciful, is only half the problem with this contention. The fact that the children in the contact visiting area are

[13] Petitioners' decision, after the district court's opinion was issued, to allow all minor siblings to have contact visitation further undermines their asserted concern that non-contact visits pose an unacceptable risk to the safety of minors.

not the ones excluded by the challenged rule makes what they might see irrelevant to this Court's ruling.

Petitioners have also suggested concerns about children "running around" and being accidentally injured. Such hypotheticals do not justify barring children from visiting family nor do they outweigh the testimony of family members that prison waiting areas and visiting rooms are safe and well-controlled. JA 208-09, 238-39, 257. Moreover, mere possibilities of harm to or disruption by small children provide no logical justification for barring all minors up to the age of 18.

Petitioners urge that requiring visitors to have "some direct relationship" with the inmate they are visiting is related to the valid penological purpose of managing the visiting rooms. Petitioners' Brief at 11, 13. This contention suggests that the relationships of brothers and sisters, nieces and nephews and the biological children of prisoners are not sufficiently close to be worth preserving. In this respect, Petitioners' visitation policy resembles the zoning ordinance in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which was stricken precisely because it selected certain categories of relatives who could live together and declared that others could not. *See also Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1007-08 (N.D. Ill. 1989) (holding that Illinois' policy of separating siblings by placing them in separate foster homes and denying them the right to visit each other burdens fundamental right of familial association); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1246 (7th Cir. 1984) (state statute which severs relationships between siblings should be stricken as burden on fundamental right of familial association).

Petitioners continue to argue that the "major" reason for precluding minors' visits was to decrease the overall

volume of visitors.[14] In rejecting this rationale, the district court made several undisputed findings: 1) Petitioners had a stated goal of reducing visiting volume by 10-15 percent. To achieve this goal, they implemented multiple rules in 1995 that standardized the number of visits allowed per prisoner and the number of people per visit, and limited all prisoners to approved visitor lists of ten non-immediate family members. The collective impact of these rules reduced volume by over 50 percent. *Bazzetta*, 148 F. Supp. 2d at 820-21; 2) Petitioners had no idea how many minor siblings, nieces and nephews visited before they were prohibited and therefore no idea whether restricting them would significantly advance the goal of decreased visitor volume or impact manageability.[15] *Id.* at 823, 829-30, n.11; 3) Petitioners did not even consider that the rules would affect siblings; and 4) Nieces and nephews under the age of 18 would have to be included in the prisoner's list of ten non-immediate family.[16]

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[14] Petitioners never asserted that volume concerns prompted the challenged restrictions on who can bring in minor children, the children of prisoners whose parental rights have been terminated and former prisoners. 6th Cir. Jt. App. 4114-15. While barring visits by any arbitrarily selected group would presumably result in some decrease in volume, thereby increasing manageability, there is no nexus between the challenged rule barring these particular visitors and decreasing volume. JA 420a.

[15] The solicitor general's amicus brief avoids addressing the impact on siblings by pointing to legislation enacted after the district court rules. The amended statute simply allows prison authorities to admit minor siblings if they choose to do so. MCL §791.268a. Tellingly, Petitioners continue to argue for a ban that includes minor siblings.

[16] Nieces and nephews were excluded because no one could think of how to verify the relationship. 6th Cir. Jt. App. 4509-13; *Bazzetta*, 148 F. Supp. 2d at 828.

Petitioners offered no rationale for preventing a prisoner's biological child from visiting where parental rights were terminated pursuant to an open adoption. *Bazzetta*, 148 F. Supp. 2d at 832-33, 849. The state has no right to interfere with the determination of the adoptive parent that continued contact with the biological parent is desirable, absent some rationale reasonably related to the agency's purpose. *Troxel v. Granville*, 530 U.S. 57 (2000).[17]

Petitioners' weak rationale for requiring children to be brought to visits only by immediate family members or legal guardians, *i.e.*, that powers of attorney could be forged, had no evidentiary support.[18] Any adult bringing a child to visit its parent is required to be on the prisoner's visitor list, process through the MDOC's screening process before being approved, and have a power of attorney. *Bazzetta*, 148 F. Supp. 2d at 849. *Troxel* also supports the rights of prisoner-parents to decide who will best supervise and care for their children.[19] Petitioners' policy greatly

[17] The United States amicus neglects the record in asserting that the district court's ruling on this issue is fatally overbroad. U.S. Brf. at 18 n.6. The sole purpose of the rule was to prevent visits when rights had been terminated for abuse. 6th Cir. Jt. App. at 4113-16. The unintended consequences was to eliminate visits between mothers and their biological children, where all parties, including the child and adoptive mother, strongly believed the visits were in the best interests of the child. 6th Cir. Jt. App. 5196-00; 2763-69; 4437-44. *See also* R. 1, Pls.' Complaint, ¶¶ 32-35 (voluntary adoption by grandmother resulted in loss of visits when child became legal sibling of prisoner).

[18] State law allows prisoners to delegate full authority to make every decision about their children with power of attorney. 6th Cir. Jt. App. at 4240-42.

[19] BOP rules provide that children under the age of 16 may visit when "accompanied by a responsible adult". 28 C.F.R. §540.44. Neither

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burdened the ability of children to visit their parents and grandparents, prevented foster care workers from keeping children in contact with their absent parents, and was even used to justify disregarding court orders for visitation without any reasonable purpose. JA 291a-94a; 6th Cir. Jt. App. at 4376-85.[20]

The rule prohibiting visits by former prisoners, which burdens Respondents' ability to maintain extended family relationships and old friendships, no matter how long the former prisoner has been a law-abiding member of the community, is wholly arbitrary.[21] While some jurisdictions bar former prisoners for limited periods of time, no jurisdiction flatly excludes all former prisoners, permanently, regardless of individual circumstances. *See Safley v. Turner*, 586 F. Supp. 589 (W.D. Mo. 1984), *aff'd*, 777 F.2d

Petitioners, nor their amici, identified any other correctional facilities that found it necessary to implement such restrictive visitation policies.

[20] Petitioners at trial also presented testimony of some MDOC officials who believed visiting in prison was not good for children. As the district court found, determining whether prison visiting rooms are good places for children to be is neither a valid penological interest nor a subject on which prison officials have any particular expertise. *Bazzetta*, 148 F. Supp. 2d at 824, 849. Parents who believe it important for their children to maintain contact with incarcerated siblings do not suddenly lose the right to exercise their child-rearing responsibilities because a state agency questions whether their choices are in the best interests of the children. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). *See also Valentine v. Englehardt*, 474 F. Supp. 294, 302 (D.N.J. 1979) ("It simply does not lie with jail officials to determine what is in the best interests of the inmate's children.").

[21] While the rule prohibited visits by all "former prisoners", it made an exception for immediate family members if permission of the warden was obtained. There were no criteria to be applied when a request was considered, and there was no mechanism for appeal of the denial.

1307 (8th Cir. 1985), *rev'd on other grounds*, 482 U.S. 78 (1987) (upholding six month bar on former inmates); 28 C.F.R. §540.44(d) (existence of a criminal conviction alone does not preclude visits to federal prisons). Given the enormous expansion of the prison system, and the resultant growing population of ex-offenders, this rule will have an ever-increasing negative impact on extended families. Again, since only non-contact visits, which effectively prevent contraband smuggling, are at issue, any special concern for security is highly exaggerated. *Bazzetta,* 148 F. Supp. 2d at 830.

In a *Turner* analysis, if there is no reasonable connection between prison regulations and the governmental interests set forth to justify them, "the regulation is unconstitutional and the other factors do not matter." *Spies v. Voinovich,* 173 F.3d 398, 403 (6th Cir. 1999). However, if a reasonable relationship exists, the Court must balance the remaining three factors. If the balance tips in favor of the prisoners, as it does in this case, the regulation must be struck down. *Id.*

When determining whether Respondents have adequate alternative means of exercising their right to intimate association, "the right in question must be viewed sensibly and expansively", *Thornburgh*, 490 U.S. at 417 (quoting *Turner* at 92). Although Petitioners assert that having the opportunity to write letters and participate in telephone conversations is an adequate means of maintaining family relationships, they did not challenge the district court's findings that "[t]he age of many of the Plaintiffs, the level of illiteracy among the class, and the intimate relationship that is at issue", render correspondence an inadequate alternative. *Bazzetta,* 148 F. Supp. 2d at 817, n.2, 849, 856. JA 277a-90a, 295a-300a (younger sibling of prisoner begs

to just see his only sister after their sole remaining parent dies).[22] Telephone calls are also poor substitutes for in-person visits. JA 212-15, 231-32. Because they are laden with surcharges, collect calls from prisoners are also prohibitively expensive for many prisoners' families. *Id.* at 818 n.2.

These alternatives are particularly useless to young children. Those who are pre-verbal communicate with parents, siblings, aunts and uncles through visual contact and expressive or gesture speech. For pre-literate children, face-to-face visitation is the sole effective mechanism for exercising their associational rights.[23] For adult prisoners and their young family members, visitation is essential to obtaining reassurance that loved ones are healthy, physically and emotionally. JA 222-31, 240-43. Expressions, gestures, and the kind of wordless communication that is a hallmark of intimate and meaningful communication, is

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[22] The states' amicus brief argues that even "functional illiterates" can "write expressive letters" and "possess a broad range of reading and writing skills," citing a U.S. Department of Education study and emphasizing a "prose literacy scale" that focuses on understanding and using information. States' Amicus at 15-16, Appendix U at u8. However, the cited study says nothing about expressive writing, and nothing in it – or any part of this brief or Petitioners' – provides the slightest basis for concluding that letter-writing is an adequate alternative for maintaining intimate relationships in the absence of face-to-face contact.

[23] While, by definition, all children under the age of 18 are subject to the rules affecting minors, Petitioners' justifications for the rules envision a child under the age of seven. Visual contacts for these children are essential. Gabel, K. & Johnston, S. (ed) *Children of Incarcerated Parents*, Lexington Books, 1995 at 97, 137 (absent visual contact, children under the age of seven report fears that their parent is dead or unsafe.)

an essential aspect of maintaining family relationships that can only occur face-to-face. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (stressing the important "emotional attachments" arising out of the "familial relationship").

There is no evidence that allowing non-contact visits would have any appreciable negative effect on prison administration and Petitioners claim none.[24] The positive effects on rehabilitation and reintegration have previously been noted. Allowing prisoners' minor children to be accompanied by an adult with a power of attorney, instead of a legal guardian, merely means reverting to prior systems in place for decades.[25] Volume would be unaffected as all but minor siblings would be included in the overall limit of ten visitors per family. The district court's conclusion is indisputable: "The use of non-contact visits for these now excluded visitors would have no impact on guards or other inmates, and a minimal impact on the allocation of prison resources." *Bazzetta*, 148 F. Supp. 2d at 849.

Finally, the existence of obvious, easy alternatives is an indication that these rules are an exaggerated response

[24] Petitioners assert that one witness testified that some of the lower security level facilities cannot arrange non-contact visitation. Petitioners omit the testimony of this witnesses' boss, the deputy director of MDOC, who testified that "all facilities currently have either built-in or portable non-contact visiting booths available." *Bazzetta*, 148 F. Supp. 2d at 831.

[25] Petitioners' policy requires that birth certificates and other necessary documents be provided by the prisoner or prospective visitor prior to approval of visits. JA 128a, 135a(G)-(J) and (Q)-(R).

to prison concerns. The clearest evidence that the challenged regulations are an exaggerated response to concerns about smuggling and child safety is the very existence of non-contact visits as an alternative. *Id.*

The balance here weighs overwhelmingly in favor of Respondents. The restrictions have a tenuous connection to a valid penological interest, and constitute an exaggerated response to concerns that can be addressed in a multitude of different ways with *de minimis* impact on prison administration. Weighed against the fundamental rights at issue, the enormous harm to the Respondents class, and the harm to the community at large caused by damaged families and increased rates of recidivism, there is no basis for reversing the district court's finding that the challenged rules are unconstitutional.

C. The Permanent Prohibition of All Visits by Family and Loved Ones as Punishment for Two Substance Abuse Misconducts Is an Infringement on the Fundamental Right of Intimate Association That Cannot Pass the *Turner* Test of Reasonableness

The challenged rule permitted the MDOC director to permanently prohibit a prisoner from receiving any visits from anyone other than attorneys or clergy on the ground that the prisoner had been found guilty of two misconducts involving substance abuse. While prisoners could apply to have their visits restored, there was no requirement that such requests be granted and no criteria for deciding

whether and when to do so.[26] Thus prisoners could be barred from seeing their children, spouses, parents, siblings, and other loved ones, even on a non-contact basis, for years or life. JA 301a-07a (prisoner restricted for alcohol misconducts died in prison hospital after mother sought visits when he became terminally ill).

The underlying misconducts included possession of illegal drugs or prison-brewed alcohol, failure to pass or refusal to take a drug test, and possession of restricted medications. JA 312a-18a (mentally ill prisoner was guilty of spitting out his medication); JA 326a-29a (restrictions issued despite the fact that prescribed medications or physical conditions interfered with their ability to urinate). Nearly thirty percent of all permanent restrictions were related only to alcohol. JA 421a. None of the challenged restrictions involved smuggling drugs into prisons, or behavior related to visits or particular visitors. *Bazzetta*, 148 F. Supp. 2d at 838.

Each major misconduct finding carries a punishment of its own, which may include loss of privileges, jobs, school and good time, and being placed on "top lock" or in segregation, and may result in transfer to a higher security facility. JA 173a-98a. A permanent visiting restriction, imposed after the prisoner has been otherwise sanctioned for two substance abuse misconducts, was designed solely to aggravate the punishment for this specific class of

[26] The arbitrary and inconsistent manner in which restoration decisions were made was one of the bases on which the circuit court found a denial of due process. *Bazzetta*, 286 F.3d at 323. The due process ruling was not identified as one of the questions for review by this Court and therefore not addressed in the certiorari briefs.

offenses. *Bazzetta,* 148 F. Supp. 2d at 836. These restrictions were adopted precisely because visits are so important to visitors and their loss constitutes such a significant deprivation. JA 268a. It is undisputed that the purpose of the permanent visiting restrictions was punishment, reflecting a "zero tolerance" philosophy regarding substance abuse of a former department director. *Bazzetta*, 148 F. Supp. 2d at 843.

The fact that it is the punishment that infringes on the fundamental rights of prisoners and visitors presents a unique context for determining whether a rule is reasonably related to a valid penological objective.[27] In this Court's prior decisions applying *Turner*, the challenged regulation proscribed conduct, either by prisoners or outsiders, normally protected by the First Amendment. Prison authorities can and do proscribe the behavior that results in misconduct citations for substance abuse. Controlling the use of alcohol, drugs or restricted medications in prisons violates no fundamental right. As a general proposition, prisoners can be and are disciplined for engaging in this misconduct.[28] That discipline may even have an

[27] In *Martinez*, 416 U.S. at n.12, the Court observed: "We need not and do not address in this case the validity of a temporary prohibition of an inmate's personal correspondence as a disciplinary sanction (usually as part of the regimen of solitary confinement) for violation of prison rules." Thus, while the Court recognized, in this pre-*Turner* decision, that restricting a First Amendment right as punishment might present a different issue, it clearly envisioned a restriction far narrower in scope than the permanent prohibition in question here.

[28] It is this discipline that Petitioners reference as imposed by a hearing officer following hearing procedures. There is no hearing or additional procedure prior to issuing the subsequent punishment of a permanent ban on visits.

indirect effect on the exercise of associational rights, as when the prisoner is transferred to a higher security facility so distant from family as to make visits difficult. *Olim v. Wakinekona,* 461 U.S. 238 (1983). Here, however, the additional punishment of a visitation ban was deliberately selected by prison officials, among all the options available to them, precisely because of its impact on the fundamental right of intimate association, the exercise of which in itself presented no threat to institutional order or security.

Where the substance of a prison punishment infringes on a fundamental right, it is subject to a balancing analysis under *Turner*. Although the nature and severity of the punishment is also subject to the constraints of the Eighth Amendment prohibition against cruel and unusual punishment, an Eighth Amendment analysis does not focus on the independent constitutional right being burdened or the impact of punishment on non-prisoners. "*[T]urner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 110 S.Ct. 1028, 1038 (1990).

Application of the *Turner* factors in the context of punishment is particularly important. To simply state that prison officials always have a right to impose punishment for misconduct, so that the assertion of discipline as a penological goal is automatically self-justifying, would destroy the purpose of *Turner* and leave fundamental rights unprotected. Constitutionally protected activities that could not be prohibited directly could be denied to large numbers of prisoners in the guise of punishment.

Where the purpose of permanently prohibiting visits by family members and other loved ones is to punish the prisoner for institutional misconduct, the requirement of a

logical connection between the punishment and the asserted goal of deterring the specific misconduct should be assessed with great care. The right to intimate association necessarily involves non-prisoners who have an independent stake in maintaining a relationship with an incarcerated loved one. Because the restriction is permanent, and makes no exception for even non-contact visits by even the closest family members, the impact of the challenged regulation on the fundamental right is particularly severe. Also, the penalty is to be imposed automatically after the second substance abuse misconduct. *Bazzetta,* 148 F. Supp. 2d at 837. No separate hearing is conducted and no individualized assessment is made. Absent any exercise of case-by-case discretion, "a closer fit between the regulation and the purpose it serves may safely be required." *Thornburgh*, 490 U.S. at 412. Finally, the right at stake is widely recognized as serving the penological goal of rehabilitation; *see also* United States Amicus Brief at 3. Thus, there is an inherent conflict of penological goals on both sides of the balance.

The misconducts involved here have nothing to do with visiting or visitors. The punishment was chosen simply because it was so painful.[29]

The lack of reasonable connection to a goal of decreasing substance abuse is demonstrated by a series of anomalies that arose from the rule's application. First, only

[29] This is distinct from cases involving drug smuggling during visits, which would logically justify restrictions on visits to that prisoner, or by that visitor. The only connection claimed here is that punishment, in general, is a deterrent and the permanent denial of all visits is a significant punishment.

prisoners who retained the support of family and friends actually suffered from permanent visiting restrictions. Those prisoners who did not receive visits in any event received no extra punishment. For prisoners struggling to maintain family ties, permanent restrictions cause the further deterioration of family relationships already stressed by the separation inherent in the incarceration of a family member. Indeed, for these prisoners, visiting restrictions are ultimately counter-productive because they create stress and destroy support systems, two critical factors in inducing substance abuse. *Bazzetta,* 148 F. Supp. 2d at 855. Finally, where the prisoner lacks the ability to conform his or her conduct in response to punishment, the pain caused is particularly pointless. For instance, while eliminating family visits can further harm the fragile condition of mentally ill prisoners, it does nothing to enable them to follow prison rules better. *Bazzetta,* 148 F. Supp. 2d at 818.

Perhaps the ultimate indication that the reasonable relationship test has not been met here is the way in which Petitioners have transformed the penalty for substance abuse misconducts into a tool for managing prisoners' general behavior. In case after case, prisoners who sought restoration of their visits after waiting the requisite period of months or years were denied solely on the basis that they had incurred other non-substance abuse misconducts in the interim. JA 319a-25a (restoration denied because subsequent misconducts unrelated to substance abuse despite the warden's favorable recommendation and the absence of any substance abuse problem for over two years). Although MDOC policy did not allow permanent visit restrictions to be imposed for any other misconducts, the object of the restriction imposed was transmuted from controlling substance abuse into

obtaining a total absence of any misconduct. JA 342a-46a (permanent restrictions continued even when the prisoner had completed substance abuse treatment, received excellent work reports, and been found suitable for release on parole).

Petitioners stress the availability of letters and phones as alternative means of communicating. The inadequacies of these methods, already discussed, are magnified when they apply to all the prisoners' family and loved ones for a period of years.

With family members and other intimate associates, the purpose of communication is not simply to convey information for a particular purpose. It is to nurture and sustain relationships that are under great stress because of the separation inherent in incarceration. JA 291a-94a. Three aspects of communication, in addition to conveying information, are critical in maintaining intimate relationships. These are spontaneous conversations, which allow the sustained sharing of thoughts and feelings, non-verbal communication and privacy.

Privacy is particularly critical for prisoners and the adults upon whom they depend the most, whether a spouse, parent, brother or favorite aunt. Anything written in a letter or said on the telephone cannot be kept from prison staff. If Michigan prisoners and their loved ones want to have any conversation that is not exposed to third parties, the only means possible is during a visit.

The importance of private communications in maintaining intimate associations is well understood. In the case of married couples, it is formally recognized by the marital privilege. *See also Griswold v. Connecticut,* 381 U.S. 479, 485 (1965) ("we deal with a right of privacy older than the Bill of Rights – older than our political parties,

older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the point of being sacred").

Striking down the permanent visiting restrictions for this particular type of misconduct imposes no new burden on prison administration. It simply preserves the pre-rule *status quo*, leaving prisoners with two substance abuse misconducts with the same opportunity to receive visits as other prisoners at their security level. All the penalties generally used for punishing misconduct will still be available. In addition, officials can choose to limit prisoners who would otherwise be eligible for contact visits to non-contact visits only.

The extraordinarily harsh permanent prohibition on visits is an exaggerated response when measured by any of several yardsticks. First, Petitioners allege that inmate substance abuse "had become an enormous security problem for prison administration," the reality is nearly opposite. There was no evidence of an "enormous problem" with substance abuse. A former director who asserted that drugs in prison could result in violence admitted testifying in 1994 "that Michigan prisons were well managed, well controlled and had an absence of violence." Moreover, the trial court found that substance abuse had been declining since the 1980's, when mandatory drug testing began. *Bazzetta,* 148 F. Supp. 2d at 843. Likewise, there was no evidence of significant problems with alcohol use or prescription misuse.

Second, prisoners classified at the highest security levels in the Michigan system retain the opportunity to receive routine visits from anyone on their approved lists, albeit on a non-contact basis. These prisoners include those who have engaged in exactly the sort of violence

about which the former director was so concerned. Yet prisoners with minimal misconduct records who had a citation for alcohol possession one year and one for possessing restricted medication a few years later, could be housed at a minimum security facility where contact visits are the norm, but deprived of all their visits.

The third yardstick is the availability of numerous other methods of controlling substance abuse by prisoners. As the district court found, Petitioners can control supply by preventing smuggling through the use of non-contact visits, approved visitor lists, monitoring of visiting room behavior, searches of visitors, and the criminal prosecution of smugglers. *Bazzetta,* 148 F. Supp. 2d at 849. They can control use through random drug tests, frequent cell searches and prisoner "patdowns", and the application of various progressive sanctions. This Court itself has identified random cell searches as "perhaps the most effective weapon of the prison administrator" in preventing the proliferation of drugs and other contraband. *Hudson v. Palmer,* 468 U.S. 517, 528 (1984).[34] These alternatives are not some "least restrictive means" invented by Respondents. They are all tools currently used by Petitioners, who have made no claim that these methods are not working adequately or that the addition of permanent visiting restrictions to their arsenal makes their efforts any more effective.

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[34] Petitioners could also choose to combat substance abuse by offering adequate drug treatment programs, a choice the testimony indicates they have not made to date. *Bazzetta,* 148 F. Supp. 2d at 843, 857.

In summary, Michigan officials insisted on imposing draconian permanent visiting restrictions despite the absence of any demonstrated problem with controlling substance abuse, despite the disproportionate harshness of the punishment compared to that imposed for more serious types of misconducts, despite the availability of numerous alternative measures and despite the counter-productive affect on both decreasing drug use and the penological goal of rehabilitation. The permanent ban as written, and especially as applied, is a clear example of an exaggerated response to prison concerns.

III. THE PERMANENT PROHIBITION OF ALL VISITS BY FAMILY AND LOVED ONES TO PRISONERS WHO INCUR TWO MISCONDUCT CITATIONS FOR SUBSTANCE ABUSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Although no case has addressed the constitutionality of imposing a total and permanent ban on visits by family and loved ones as punishment for twice violating institutional rules against substance abuse, there have been suggestions that such a prohibition would not be permitted. In *Kentucky v. Thompson*, 490 U.S. 454 (1989), this Court upheld the imposition, without a hearing, of temporary restrictions on particular visitors for reasons related to smuggling contraband. In his concurring opinion Justice Kennedy emphasized:

> [T]his case involves a denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not.

Id. at 465.

In *Laaman v. Helgemoe*, 437 F. Supp. 269 (D. NH 1977), the court resolved a class action lawsuit regarding various conditions in New Hampshire State Prison. Although a rule that permitted a total suspension of visits as punishment for "poor conduct" was never enforced, the court addressed the rule as written. The court recognized that a total ban or unreasonable restrictions on visitation implicate prisoners' First Amendment rights, then went on to state:

> Unreasonable restrictions on visitation also involves the Eighth Amendment when the failure to allow inmates to keep their community ties and family bonds promotes degeneration and decreases their chances of successful reintegration into society.

Id. at 320.[35]

There is unanimity on the cruelty of this type of punishment. Courts, correctional experts, academics, legislatures and the public all concur that visits from family and loved ones are "the single most important

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[35] *See also Thomas v. Brierley*, 481 F.2d 660, 661 (3rd Cir. 1973) ("the denial of visitation privileges without a reasonable justification might amount to cruel and unusual punishment."); *Almond v. Kent*, 459 F.2d 200, 204 (4th Cir. 1972) (complete denial of visits with wife and family while in segregation set forth an Eighth Amendment claim); *Buie v. Jones*, 717 F.2d 925 (4th Cir. 1983) (J. Murnaghaw, concurring) ("Those who operate detention facilities, whether in the form of local jails or prisons, should be aware that the absolute prohibition on visitation by detainees' minor children ... is almost certainly unconstitutional").

factor" in maintaining prisoners' mental health and emotional well-being, encouraging a positive adjustment to incarceration, and enabling them to re-enter the community successfully. *Bazzetta,* 148 F. Supp. 2d at 818. *See also id* at n.2, 854. It is undisputed that eliminating visits has a "devastating impact" on both familial relationships and prisoner mental health. *Id.* at 852, 854 (summarizing expert and Respondents testimony at trial). JA 244a-48a, 249a-66a, 335a, 346a.

A permanent ban on all visits with loved ones was imposed: 1) without any prior notice to prisoners (misconducts that pre-dated notice of the punishment were counted); 2) without advising prisoners of any possibility for removing the ban. (The policy advising prisoners that the ban could be lifted was not issued until January 1, 1998, three years after the ban was implemented) (JA 126a, 151a-53a); and 3) without any criteria for removal, hearings or appeals. Further, the ban would be issued irrespective of whether the prisoner received both of his or her misconducts in one day or whether the prisoner's last misconducts was three years prior. JA 330a-32a, 339a-41a. The ban might be issued immediately after the second misconduct or could occur two years later, with no misconduct occurring in the intervening years. JA 336a-38a. There was no individual review and no mechanism for exceptions. The arbitrary and callous manner in which this punishment was imposed against over a thousand prisoners sets this prison rule apart from all other states.

It was precisely because of the pain it would cause that the then-director of corrections chose the permanent visiting restriction as a form of punishment. This director rebuffed public opposition, in-house objections, and long-standing correctional policies providing that "the least

drastic method to ensure compliance with the rules should be used". JA 156a, PD 03.03.105(B). 6th Cir. Jt. App. at 4156-57; 2686-90; 2691-95; JA 268a.[36] The pain was exacerbated by the arbitrary manner in which the punishment was imposed and the callous and capricious way in which restoration requests were treated. *Bazzetta,* 148 F. Supp. 2d at 836-43.

Further, no one, including correctional officials administering the ban, knew what the key was to having the ban lifted. *Id.* at 841, 842 n.41. The only sure thing was that it was admittedly very harsh and deeply painful for prisoners who had family who visited.

This Court has applied the Eighth Amendment in prison cases of two types – those that address "conditions of confinement" and those that address "excessive force". The "conditions" cases assessed various acts or omissions by prison officials in the routine administration of their facilities that caused prisoners to suffer harm. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Helling v. McKinney*, 509 U.S. 25 (1993); *Farmer v. Brennan*, 511 U.S. 825 (1994). The

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[36] Petitioners assert that "public attitude" weighs heavier than expert opinion in determining whether a given sanction constitutes an Eighth Amendment violation. In this case, both public opinion and experts rejected these rules as too cruel a punishment. JA 267a-68a; *Bazzetta,* 148 F. Supp. 2d at 854, 855. Historical practices are not pertinent to the inquiry of whether a particular sanction violates standards of decency, or suggested by the United States amicus. *Atkins v. Virginia,* 536 U.S. 304, 544 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail").

"excessive force" cases assessed the application of physical force when controlling prisoner behavior. *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992).

Both lines of cases required, to different degrees, the satisfaction of both an objective and subjective component for establishing an Eighth Amendment violation. The objective component – that the alleged deprivation be "objectively sufficiently serious" – is "contextual and responsive to contemporary standards of decency". *Hudson*, 503 U.S. at 8. The deprivation may be physical or psychological. Emotional deprivation, depending on its severity, can constitute cruel and unusual punishment. *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940) (interrogations "calculated to inspire terror" unconstitutional); *see also Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993), *en banc* (severe psychological injury and emotional pain from intrusive cross-gender body searches violates Eighth Amendment rights); *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993) (Eighth Amendment requires a showing of a "serious or significant physical or emotional injury"); *Perlman v. Kansas Dep't of Corrections*, 165 F.2d 803, 810 (10th Cir. 1999) ("the infliction of psychological pain can violate the Eighth Amendment").

Being part of a family forms our identity as individuals. Contact with those who love us and know us best is a basic human need. The importance of visitation to prisoner rehabilitation is so widely recognized that affirmatively encouraging visits is the universal norm. (*See* n.6, *supra.*) *See also Kentucky v. Thompson*, 490 U.S. at 468-69 (Marshall, J. dissenting).

The pain caused by a complete deprivation of all companionship with their loved ones for a class of prisoners totaling nearly twelve hundred at the time the policy was halted, is sufficiently serious to satisfy the objective component of the Eighth Amendment. *Bazzetta,* 148 F. Supp. 2d at 854-55.

In conditions cases, the subjective component, that officials have a "sufficiently culpable state of mind", required a showing that officials exhibited deliberate indifference to inmate health or safety in condition cases. *Farmer* at 834. In excessive force cases, the inquiry centered on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley* at 320-21.[37]

After the lower court opinions in the instant case were issued, this Court decided *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), which addressed the type of official conduct at issue here – the deliberate administration of formal punishment. In *Hope*, handcuffing a prisoner to a hitching post for seven hours was found to be an "obvious violation" of the Eighth Amendment. Analysis of the subjective component of the Eighth Amendment, official culpability, was unnecessary where the act was carried out as punishment and intended "to inflict gratuitous pain or discomfort, with no justification in threatened harm or a

[37] Petitioners' reference to deference to be afforded prison administration in the adoption of discipline policies involves the underlying intentions of the prison official in determining whether the official has a sufficiently culpable state of mind for purposes of satisfying the subjective component of the Eighth Amendment, not the objective assessment of the seriousness of the harm. *Farmer*, 511 U.S. at 845.

continuing refusal to work." *Id.* at 2519. In concluding, the Court held that Hope was treated in a way antithetical to human dignity" and that "[t]he use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment [,which] is nothing less than the dignity of man.' *Trop v. Dulles*, 356 U.S. 86, 100 (1958)." *Hope* at 2514-15.

Although imposing punishment to deter misconduct is permissible, that permission does not justify every punishment prison officials may wish to impose. Notwithstanding the state's interest in controlling prisoner behavior, the means are subject to the constraints of the Eighth Amendment. In *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), the Court utilized several criteria in deciding that corporal punishment violates the Eighth Amendment. These included the fact that the punishment frustrates rehabilitation and re-entry, is not generally accepted by corrections professionals, and lacks general public acceptance. All of these considerations are equally applicable to Petitioners' permanent ban on all visits with family and friends. Duration is an important factor in determining whether a punishment is cruel and unusual. *Hutto v. Finney*, 437 U.S. 683, 687 (1978) (a condition might be "tolerable for a few days and intolerably cruel for weeks or months").

When the punishments " 'involve the unnecessary and wanton infliction of pain,' " or are "grossly disproportionate to the severity of the crime", as is the case with the permanent ban, the objective component is satisfied. *Rhodes v. Chapman*, 452 U.S. at 345-46. The lack of justification for the imposition of permanent visiting restrictions to punish substance abuse misconducts is addressed in the application of the *Turner* factors in Issue II. There is no logical

connection between the misconduct and the punishment. There was no evidence that substance abuse was so rampant or so problematic as to warrant extreme measures. There was no showing that the punishment was actually effective in deterring substance abuse. Conversely, there was ample evidence that the punishment is counterproductive. Most telling, perhaps, is that once the punishment was imposed, the justification became a moving target. A prisoner who received a visiting restriction for possessing home-made alcohol could end up never seeing his family again because he received subsequent unrelated misconducts for which visiting restrictions could not be imposed.

The clearest evidence of how far Michigan exceeded the boundaries of contemporary standards of decency is the fact that no other jurisdiction imposes anything close to a permanent visiting restriction for two instances of substance abuse. To the extent that other states use visiting restrictions as punishment at all, they do so in a far more limited manner, as noted in the states, amicus brief, New York, Nevada, Oregon and North Dakota use visiting restrictions only for visit-related misconduct. Indiana, Missouri, Pennsylvania, South Dakota and Texas only restrict prisoners to non-contact visits. California, Idaho, Maryland, North Carolina, Ohio, Oklahoma and Rhode Island impose restrictions of six months or less. New Hampshire limits restrictions on family visits to 30 days. Some states, like Florida, Colorado and South Carolina, clearly differentiate between penalties for illegal controlled substances and alcohol. No states implement their rules in such an indiscriminate and arbitrary fashion.

The United States' amicus brief suggests that three cases, which found no inherent constitutional violation in the isolation of prisoners in administrative, or punitive segregation, illuminate the issue before this Court. In each of the cases referenced, prisoners retained their visitation rights while subjected to increased security. *Hewitt v. Helms*, 459 U.S. 460, 479-80 n.1 (1983) (undisputed that prisoners in administrative segregation retained visits); *Jackson v. Meachum*, 699 F.2d 578, 580-81 (1st Cir. 1983) (prisoner in maximum security unit allowed visitors although limited); *Finney v. Hutto*, 410 F. Supp. 257, 262 (D.C. Ark. 1976) (visit complaints resolved with new rules for visits between family and friends). There was no complaint that those plaintiffs lost visits as part of their confinement in segregation or isolation cells in the case of *In re Long Term Administrative Seg.*, 174 F.3d 464 (4th Cir. 1999), nor could there be, as South Carolina, like the BOP and Michigan, allow prisoners in maximum security, segregation and isolation to retain their visits. 28 C.F.R. §541.12(5) (inmates in disciplinary and special housing units "[h]ave the right to visit and correspond with family members and friends"); 28 C.F.R. §540.50(C) ("Ordinarily, an inmate retains visiting privileges while in detention or segregation status"); JA 139a(DD).

In addition, these cases did not involve permanent isolation. *Hewitt*, 459 U.S. at 469-70 (administrative segregation of prisoners for security purposes following a riot, limited to six months); *Hutto v. Finney*, 437 U.S. 678 (1978) (punitive segregation was for a maximum of thirty days, and administrative segregation inmates were generally released in fourteen days).

Finally, isolation from other prisoners is a significantly different harm than isolation from all of one's family and loved ones, and does not involve the burden of the independent and fundamental constitutional liberty interest in family companionship, at issue before this Court.

CONCLUSION

Rarely have prison rule changes caused such wide and deep harm to so many with so little purpose.

A state agency director pushed these rules through the administrative process, thoughtlessly burdening fundamental rights of family association and integrity, then that agency carelessly and arbitrarily implemented them. The judicial intervention below does not evidence lack of deference to reasoned administrative judgment. Rather, striking down these rules was, and is, necessary to protect the fundamental constitutional rights of prisoners and their families as violative of the First and Fourteenth Amendment rights of the Respondent class and the Eighth Amendment rights of the Respondent prisoners. Striking down these rules is in accordance with this Court's oft-repeated assertions that prisoners retain, and federal courts protect, those rights not inherently incompatible with their status or inconsistent with valid penological purposes. Respondents' non-contact visitation rights do not

fall into either category and should be protected against these arbitrary restraints.

Respectfully submitted,

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